Senator Lindsey Graham, Ranking Member
Questions for the Record
Mr. Michael Etan Farbiarz
Nominee to be United States District Judge, District of New Jersey

1. **Is it legal for police to stop and frisk someone based on a reasonable suspicion of involvement in criminal activity?**

   Response: "[U]nder the exception to the warrant requirement established in Terry v. Ohio, 392 U.S. 1 (1968), 'an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot.'" United States v. Brown, 448 F.3d 239, 244 (3d Cir. 2006) (citation omitted). Such "an investigatory stop" is "also known as . . . a 'stop and frisk.'" Id.

2. **Under Supreme Court and Third Circuit precedent, what is a "fact" and what sources do courts consider in determining whether something is a question of fact or a question of law?**

   Response: "[T]he appropriate methodology for distinguishing questions of fact from questions of law has been . . . elusive[,]" Miller v. Fenton, 474 U.S. 104, 113 (1985) (collecting cases), and "the [Supreme] Court has yet to arrive at "'a rule or principle that will unerringly distinguish a factual finding from a legal conclusion.'" Id. (1985) (quoting Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982)). This said, the Court has described a "fact" as "a recital of external events," Thompson v. Keohane, 516 U.S. 99, 110 (1995) (internal quotation marks omitted), and has stated that a question of fact includes, at a minimum, the determination of "what happened," id. (internal quotation marks omitted). That an issue is factual or legal can impact, among other things, whether appellate review is de novo or for clear error. See, e.g., Monasky v. Taglieri, 140 S. Ct. 719, 730 (2020). In light of this, the Supreme Court has distinguished questions of law from questions of fact by considering whether, "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." Miller, 474 U.S. at 114; see also, e.g., U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC, 138 S. Ct. 960, 966-67 (2018); cf. Markman v. Westview Instruments, Inc., 517 U.S. 370, 388 (1996). The Third Circuit has followed this approach. See United States v. Brown, 631 F.3d 638, 642-45 (3d Cir. 2011); see also, e.g., In re Fosamax (Alendronate Sodium) Prod. Liab. Litig., 852 F.3d 268, 289–93 (3d Cir. 2017), vacated and remanded sub nom. Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668 (2019).

3. **How do you distinguish between "attacks" on a sitting judge and mere criticism of an opinion he or she has issued?**

Response: Criticism is common -- every motion for reconsideration and every appeal is, in some sense, a criticism of a judicial opinion, and the Supreme Court has affirmed that the Constitution protects criticism of public officials, including judges. See, e.g., Bridges v. State of Cal., 314 U.S. 252, 270-71 (1941). The particular distinction referenced in the question, between criticism and verbal attacks, is not one I have used. But there is a sharp divide between criticism and physical threats. See, e.g., Chief Justice John G. Roberts, Jr., 2022 Year-End Report on the Federal Judiciary at 3 (Dec. 31, 2022).

4. **Which of the four primary purposes sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important? Which of these principles, if confirmed, will guide your approach to sentencing defendants?**

Response: Title 18, United States Code, Section 3553(a) mandates consideration of each of the above-listed principles in fashioning a sentence. The statute does not assign weights to them. Federal sentencing involves a number of steps: (1) gathering factual information as to the offense and the defendant by the United States Probation Office, see Fed. R. of Crim. Pr. 32(c); (2) reviewing the Presentence Report and assessing any objections to it, see id. 32(c)-(g); (3) calculating the applicable United States Sentencing Guidelines; (4) considering counsel's arguments; (5) affording victims, see 18 U.S.C. § 3771(a)(4), and the defendant, see Fed. R. of Crim. Pr. 32(i) (4)(a)(ii), the right to be heard; and then (5) imposing sentence in light of the factors set out in Title 18, United States Code, Section 3553(a). See generally United States v. Tomko, 562 F.3d 558, 567-69 (3d Cir.2009) (en banc) (describing the sentencing process). This process is designed to be both fact-intensive and rigorous. At the conclusion of the sentencing process in a particular case, it might become clear, as to that case, that one of the Section 3553(a) sentencing factors looms relatively larger than the others.

5. **In what situation(s) does qualified immunity not apply to a law enforcement officer in New Jersey?**

Response: Qualified immunity does not shield a New Jersey law-enforcement officer who violates another person's federal constitutional right if the right was "clearly established." See Anderson v. Creighton, 483 U.S. 635, 638 (1987); see also, e.g., Clark v. Coupe, 55 F.4th 167, 178 (3d Cir. 2022). "A right is clearly established when it is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 7 (2021) (per curiam) (quoting Mullenix v. Luna, 577 U.S. 7, 11 (2015) (per curiam)). There does not need to be "a case directly on point for a right to be clearly established," but "existing precedent must have placed the statutory or constitutional question beyond debate." Id. at 7–8 (quoting White v. Pauly, 137 S. Ct. 548, 551 (2017) (per curiam)); see also, e.g., Clark, 55 F.4th at 178.

6. **Please identify a Supreme Court decision from the last 50 years that is a typical example of your judicial philosophy and explain why.**

   Response: Each federal judge swears to "administer justice without respect to persons[.]" 28 U.S.C. § 453. My judicial philosophy would be to honor the judicial oath, by deciding each case in precisely the same way: on the facts before the Court; on the law; and based on the parties' arguments. Numerous Supreme Court decisions exemplify this philosophy. One is Cassirer v. Thyssen-Bornemisza Collection Found., 142 S. Ct. 1502 (2022), in which the Court resolved a choice-of-law issue that arose under the Foreign Sovereign Immunities Act of 1978. The Court's decision was rooted in consideration of the facts, see id. at 1506-08; focused on analysis of the law (and not, for example, on policy concerns), see id. at 1508-10; and proceeded from the arguments made orally and in writing by the various participants in the case, see id. at 1509-10.

7. **Please identify a Third Circuit judicial opinion from the last 50 years that is a typical example of your judicial philosophy and explain why.**

   Response: As to my judicial philosophy, please see my response to Question 6. Numerous Third Circuit decisions exemplify this philosophy. One is Xerox Corp. v. SCM Corp., 576 F.2d 1057 (3d Cir. 1978), in which the Third Circuit affirmed a denial of a motion to dismiss in a District of New Jersey patent infringement case; the basis of the motion had been that the patent infringement claims were compulsory counterclaims, and accordingly should have been raised in a separate federal case then-pending between the parties, an antitrust action in the District Connecticut. The Third Circuit's decision was rooted in the facts, see id. at 1057-59; focused closely on the law, see id. at 1059-61; and considered the arguments made by the parties, see id. at 1060 and id. at 1060 n.4.

8. **Please state the governing law for self-defense in New Jersey and the Third Circuit.**

   As to New Jersey law: "The New Jersey Code of Criminal Justice . . . defines the manner and circumstances in which a person may use force to protect himself from harm. [The Code] . . . generally provides that 'the use of force upon or toward another person is justifiable when the actor reasonably believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.' The Code, however, places specific constraints on the use of deadly force in self-defense[:] The use of deadly force is not justifiable under this section unless the actor reasonably believes that such force is necessary to protect himself against death or serious bodily harm; nor is it justifiable if: (a) The actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter; or (b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take . . . ." State v. Rodriguez, 195 N.J.

165, 171-72, 949 A.2d 197, 201 (2008) (internal quotation marks and citations removed); see also, e.g., State v. Handy, 215 N.J. 334, 356–57, 73 A.3d 421, 434 (2013).

As to federal law, the Third Circuit has treated self-defense as a justification. In the context of a Title 18, United States Code Section 922(g) prosecution, the Third Circuit has held that the defendant can establish this justification by showing that: "(1) he was under unlawful and present threat of death or serious bodily injury; (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) he had no reasonable legal alternative (to both the criminal act and the avoidance of the threatened harm); and (4) there is a direct causal relationship between the criminal action and the avoidance of the threatened harm." United States v. Alston, 526 F.3d 91, 95 (3d Cir. 2008) (internal quotation marks, citation, and footnote omitted). Somewhat different formulations have also been used. See, e.g., Third Circuit Model Criminal Jury Instructions, Section 8.04 (Justification).

9. **Please explain your understanding of 18 USC § 1507 and what conduct it prohibits.**

Response: Title 18, United States Code, Section 1507, is a criminal statute. It reads: "Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be [punished.]"

10. **Under Supreme Court precedent, is 18 USC § 1507, or a state statute modeled on § 1507, constitutional on its face?**

Response: If confirmed, and confronted with a case that required consideration of the constitutionality of Title 18, United States Code, Section 1507, I would assess the matter based on the facts before the Court; the governing law, including, as appropriate, Cox v. Louisiana, 379 U.S. 559 (1965), which upheld an arguably analogous state statute against a First Amendment challenge; and the parties' arguments.

11. **Please explain the differences in the introduction of evidence between federal courts and a military commission.**

Response: The introduction of evidence is generally governed in federal court by the Federal Rules of Evidence ("Federal Rules") and in a military commission by the Military Commission Rules of Evidence ("Military Rules"). There is overlap between these Rules. For example, Rule 401 of the Federal Rules determines what evidence is relevant, and Rule 401 of the Military Rules is similar to Rule 401 of the Federal Rules. To cite another example, Federal Rule 404 limits the use of character evidence, and Rule 404 of the Military Rules is similar to Rule 404 of the Federal Rules. There are also

differences between the Federal Rules and the Military Rules. For example, the Federal Rules' approach to hearsay, see Federal Rules 801-807, is different in certain respects than the Military Rules' approach, see Military Rules 801, 803, 805, 807.

12. **What is the operative standard for determining whether a statement is not protected speech under the "fighting words" doctrine?**

    Response: "Fighting words" are "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." Cohen v. California, 403 U.S. 15, 20 (1971) (citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)). To determine what constitutes "fighting words," courts ask "whether the expression 'is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'" Texas v. Johnson, 491 U.S. 397, 409 (1989) (citation omitted).

13. **What is the operative standard for determining whether a statement is not protected speech under the true threats doctrine?**

    Response: "True threats" are "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Virginia v. Black, 538 U.S. 343, 359-60 (2003). Whether a statement is a "true threat[]" "cannot be determined solely by the reaction of the recipient, but must instead be 'determined by the interpretation of a reasonable recipient familiar with the context of the communication[.]'" Elonis v. United States, 575 U.S. 723, 751 (2015) (citation omitted).

14. **Please answer the following questions yes or no. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer:**

    a. **Was *Brown v. Board of Education* correctly decided?**

       Response: Yes. There is no likelihood that de jure segregation will be re-imposed in American public schools. Accordingly, no federal judge "will have to face the question . . . whether Brown v. Board of Education was rightly decided." Amy Coney Barrett & John Copeland Nagle, Congressional Originalism, 19 U. PA. J. CONST. L. 1, 17 (2016). This question may therefore be answered consistent with the Code of Conduct for United States Judges, and the practice of other nominees. I believe that Brown was correctly decided.

    b. **Was *Loving v. Virginia* correctly decided?**

       Response: Yes. There is no likelihood that legal restrictions on interracial marriage will be re-imposed, and Loving follows closely from Brown. This question may therefore be answered consistent with the Code of Conduct for

United States Judges, and the practice of other nominees. I believe that Loving was correctly decided.

c. **Was *Griswold v. Connecticut* correctly decided?**
d. **Was *Roe v. Wade* correctly decided?**
e. **Was *Planned Parenthood v. Casey* correctly decided?**
f. **Was *Gonzales v. Carhart* correctly decided?**
g. **Was *District of Columbia v. Heller* correctly decided?**
h. **Was *McDonald v. City of Chicago* correctly decided?**
i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**
j. **Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?**
k. **Was *Dobbs v. Jackson Women's Health* correctly decided?**

Response: I am unable to answer the above questions "yes" or "no." Supreme Court nominees, such as now-Justices Barrett and Jackson, have regularly declined to provide a "thumbs-up" or "thumbs-down" as to Supreme Court precedents. Following this approach is especially important for prospective lower federal court judges, who must faithfully follow Supreme Court precedent, and who lack any power to alter such precedent. See, e.g., State Oil Co. v. Khan, 522 U.S. 3, 20 (1997); Agostini v. Felton, 521 U.S. 203, 237 (1997).

15. **What legal standard would you apply in evaluating whether or not a regulation or statutory provision infringes on Second Amendment rights?**

Response: When the text of the Second Amendment covers an individual's firearms-related conduct, that conduct is "presumptively constitutional." New York Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2126 (2022). To justify regulation of such conduct, the government must show "that the regulation is consistent with this Nation's historical tradition of firearm regulation." Id. (citations omitted).

16. **Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."**
    a. **Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: Not to my knowledge.

    b. **Are you currently in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**

Response: Not to my knowledge. Note that I do not know, and have never interacted with, any of the listed people.

c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**

Response: Not to my knowledge. Note that I do not know, and have never interacted with, any of the listed people.

17. **The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society."**
    a. **Has anyone associated with Alliance for Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: Not to my knowledge.

    b. **Are you currently in contact with anyone associated with the Alliance for Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**

    Response: Not to my knowledge. Note that I do not know, and have never interacted with, any of the listed people.

    c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**

    Response: Not to my knowledge. Note that I do not know, and have never interacted with, any of the listed people.

18. **Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."**
    a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
    b. **Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund.**

c. **Are you currently in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**
d. **Have you ever been in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**

Response: I have had no contact with the organizations listed above. As I understand it, New Venture Fund provides administrative, accounting, and other services as a "fiscal sponsor" to numerous non-profit organizations; from 2020 to 2022, the "fiscal sponsor" of an organization my wife worked for was New Venture Fund.

19. **The Open Society Foundations is a progressive organization that "work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens."**
    a. **Has anyone associated with Open Society Fund requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: Not to my knowledge.

    b. **Are you currently in contact with anyone associated with the Open Society Foundations?**

    Response: Not to my knowledge.

    c. **Have you ever been in contact with anyone associated with the Open Society Foundations?**

    Response: Not to my knowledge.

20. **Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."**
    a. **Has anyone associated with Fix the Court requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: Not to my knowledge.

b. **Are you currently in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**

Response: Not to my knowledge. Note that I do not know, and have never interacted with, any of the listed people.

c. **Have you ever been in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**

Response: Not to my knowledge. Note that I do not know, and have never interacted with, any of the listed people.

21. **Please describe the selection process that led to your nomination to be a United States District Judge, from beginning to end (including the circumstances that led to your nomination and the interviews in which you participated).**

Response: I received a questionnaire from a member of Senator Booker's Judicial Selection Advisory Group during April 2021. I submitted it in May 2021 and was interviewed by the Group in August 2021. I was interviewed by Senator Booker in August 2022. Shortly thereafter, I was interviewed by Senator Menendez and then by attorneys at the Office of the White House Counsel. Since August 15, 2022, I have been in contact with the Office of Legal Policy at the Department of Justice. On December 21, 2022, the President announced his intent to nominate me, and on January 3, 2023 the President nominated me.

22. **During your selection process did you talk with any officials from or anyone directly associated with the organization Demand Justice, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: Not to my knowledge.

23. **During your selection process did you talk with any officials from or anyone directly associated with the American Constitution Society, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: Not to my knowledge.

24. **During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors, or did anyone do so on your behalf? If so, what was the nature of those discussions? Please include in this answer anyone associated**

with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.

Response: I have had no contact with the organizations listed above. As I understand it, New Venture Fund provides administrative, accounting, and other services as a "fiscal sponsor" to numerous non-profit organizations; from 2020 to 2022, the "fiscal sponsor" of an organization my wife worked for was New Venture Fund.

25. **During your selection process did you talk with any officials from or anyone directly associated with the Open Society Foundations, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: Not to my knowledge.

26. **During your selection process did you talk with any officials from or anyone directly associated with Fix the Court, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: Not to my knowledge.

27. **List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding your nomination**.

Response: I was interviewed by White House Counsel personnel on August 11, 2022, and I have communicated with Department of Justice and/or White House Counsel personnel at various points from August 11 to the present.

28. **Please explain, with particularity, the process whereby you answered these questions.**

Response: I received these questions from the Department of Justice, along with questions from other Senators. I conducted some legal research, wrote out answers to each question, and sent my answers back to the Department of Justice. After submitting my answers, I received comments from the Department of Justice. I considered the comments, revised my answers in certain respects, and conveyed a final set of answers to the Department of Justice, for conveying to the Committee.

Senator Mike Lee
Questions for the Record
Michael Farbiarz, Nominee to the United States District Court for the District of New Jersey

1. How would you describe your judicial philosophy?

Response: Each federal judge swears to "administer justice without respect to persons[.]" 28 U.S.C. § 453. My judicial philosophy would be to honor the judicial oath, by consistently deciding each case in the same way: on the facts before the Court; on the law; and based on the parties' arguments.

2. What sources would you consult when deciding a case that turned on the interpretation of a federal statute?

Response: I would first determine whether there is any binding Supreme Court or Third Circuit precedent that resolves the issue presented. If not, I would look to "the statutory text, not the legislative history or any other extrinsic material," Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005), and would focus on interpreting the "statute in accord with the ordinary public meaning of its terms at the time of its enactment." Bostock v. Clayton County, Georgia, 140 S. Ct. 1731, 1739 (2020); see also, e.g., Gross v. FBL Financial Services, Inc., 557 U.S. 167, 175 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."). If the statutory text is ambiguous under binding precedent, see, e.g., In re Price, 370 F.3d 362, 369 (3d Cir. 2004) ("a provision is ambiguous when, despite a studied examination of the statutory context, the natural reading of a provision remains elusive"), I would look to other interpretive tools, to the extent doing so is authorized by Supreme Court and Third Circuit precedent. These tools might include application of certain canons of construction. If ambiguity persists, I would consider the statute's legislative history, with a focus on those parts of the legislative history identified by the Supreme Court and Third Circuit as more reliable. Compare, e.g., Garcia v. United States, 469 U.S. 70, 76 (1984) (describing more reliable sources) with NLRB v. SW Gen., Inc., 137 S. Ct. 929, 943 (2017) (warning that "floor statements by individual legislators rank among the least illuminating forms of legislative history").

3. What sources would you consult when deciding a case that turned on the interpretation of a constitutional provision?

Response: I would first determine whether there is any binding Supreme Court or Third Circuit precedent resolving the issue presented. From my experience as a practicing lawyer, I believe that faithful consideration of binding precedents resolves all or virtually all questions that might face a district judge with respect to constitutional interpretation. In the rare instance when that might not be the case, lower federal court judges are bound to follow the interpretive methods set down by the Supreme Court. I would do so. The Supreme Court has stated that "the public

understanding of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation." District of Columbia v. Heller, 554 U.S. 570, 605 (2008) (emphasis removed). In addition, the Supreme Court has directed lower federal courts to zero in on historical understandings of the Constitution in a number of areas. See, e.g., Kennedy v. Bremerton, 142 S. Ct. 2407 (2022); (First Amendment, Establishment Clause); New York Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022) (Second Amendment); United States v. Jones, 565 U.S. 400 (2012) (Fourth Amendment); Crawford v. Washington, 514 U.S. 36 (2006) (Sixth Amendment, Confrontation Clause). In other areas, the Supreme Court has directed lower federal courts to broaden the focus, to consider additional interpretive approaches. See, e.g., Reed v. Town of Gilbert, Ariz., 675 U.S. 155, 163 (2015) (interpreting the First Amendment's Free Speech Clause in light of a narrow tailoring/strict scrutiny test).

4. What role do the text and original meaning of a constitutional provision play when interpreting the Constitution?

Response: The "public understanding of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation[.]" District of Columbia v. Heller, 554 U.S. 570, 605 (2008) (emphasis removed).

5. How would you describe your approach to reading statutes? Specifically, how much weight do you give to the plain meaning of the text?

Response: Please see my response to Question 2.

a. Does the "plain meaning" of a statute or constitutional provision refer to the public understanding of the relevant language at the time of enactment, or does the meaning change as social norms and linguistic conventions evolve?

Response: As to interpreting statutes, it is "a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute." New Prime, Inc. v. Oliveira, 139 S.Ct. 532, 539 (2019) (internal quotation marks omitted). As to interpreting constitutional provisions, "when it comes to interpreting the Constitution, not all history is created equal[,]" New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2136 (2022), because "Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*." Id. (internal quotation marks omitted, emphasis in original).

6. What are the constitutional requirements for standing?

Response: "[A] plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021).

7. Do you believe Congress has implied powers beyond those enumerated in the Constitution? If so, what are those implied powers?

Response: The Constitution enumerates the powers of Congress, in, for example: Article I; Section Two of the Thirteenth Amendment; Section Five of the Fourteenth Amendment; and Section Two of the Fifteenth Amendment. One of Congress' Article I powers is the power "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." Under the quoted Necessary and Proper Clause, Congress may legislate, where the end is "within the scope of the constitution[,]" by "all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution." McCulloch v. Maryland, 17 U.S. 316, 421 (1819).

8. Where Congress enacts a law without reference to a specific Constitutional enumerated power, how would you evaluate the constitutionality of that law?

Response: I would evaluate the statute based on the facts; the law as set out by the Supreme Court and the Third Circuit, including the law that governs the reach of particular enumerated Congressional powers; and the parties' arguments. It bears noting that "[t]he question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 570 (2012) (internal quotation marks omitted).

9. Does the Constitution protect rights that are not expressly enumerated in the Constitution? Which rights?

Response: Based on substantive due process, the Supreme Court has held that the Constitution protects certain rights that are not expressly enumerated, including, for example: the right to interracial marriage, Loving v. Virginia, 388 U.S. 1 (1967); the right to direct the education of one's children, Meyer v. Nebraska, 262 U.S. 390 (1923), Pierce v. Society of Sisters, 268 U.S. 510 (1925); the right of adults to engage in private, consensual sexual acts, Lawrence v. Texas, 539 U.S. 558 (2003); and the right to marry a person of the same sex, Obergefell v. Hodges, 576 U.S. 644 (2015). See generally Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2257-58 (2022) (setting out a fuller list); see also, e.g., TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443, 453-54 (1993) ("the Due Process Clause of the Fourteenth Amendment imposes substantive limits" on civil punitive damages). When a litigant claims that a right, not previously recognized by the Supreme Court, is protected by substantive due process, that claim is assessed under Washington v. Glucksberg, 521 U.S. 702 (1997), which requires that unenumerated rights be both "deeply rooted in the Nation's history and tradition" and "implicit in the concept of ordered liberty." Id. at 719–21.

10. What rights are protected under substantive due process?

Response: Please see my response to Question 9 above.

11. If you believe substantive due process protects some personal rights such as a right to abortion, but not economic rights such as those at stake in *Lochner v. New York*, on what basis do you distinguish these types of rights for constitutional purposes?

Response: The Supreme Court has held that substantive due process protects neither economic rights of the type at issue in Lochner, see Ferguson v. Skrupa, 372 U.S. 726, 730 (1963), West Coast Hotel v. Parrish, 300 U.S. 379 (1937), nor abortion rights, see Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2242, 2262 (2022).

12. What are the limits on Congress's power under the Commerce Clause?

Response: Congress' power under the Commerce Clause includes power to regulate: (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce," and (3) "those activities that substantially affect interstate commerce." United States v. Lopez, 514 U.S. 549, 558-59 (1995). This power does not allow Congress to require "individuals to become active in commerce by purchasing a product." Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 552 (2012). As to statutes that concern criminal conduct and that "d[o] not regulate economic activity[,]" Gonzales v. Raich, 545 U.S. 1, 25 (2005), the limits on Congress' Commerce Clause power include those set out in Lopez and United States v. Morrison, 529 U.S. 598 (2000).

13. What qualifies a particular group as a "suspect class," such that laws affecting that group must survive strict scrutiny?

Response: The Supreme Court has defined "suspect" classes with reference to "an immutable characteristic determined solely by the accident of birth" or "such disabilities, or . . . such a history of purposeful unequal treatment, or . . . such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." Johnson v. Robison, 415 U.S. 361, 375 n.14 (1974). The Supreme Court has identified race, religion, national origin, and alienage as "suspect." See New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Graham v. Richardson, 403 U.S. 365, 372 (1971).

14. How would you describe the role that checks and balances and separation of powers play in the Constitution's structure?

Response: "The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial." INS v. Chadha, 462 U.S. 919, 951 (1983). "The declared purpose of separating and dividing the powers of government, of course, was to 'diffus[e] power the better to secure liberty.'" Bowsher v. Synar, 478 U.S. 714, 721 (1986) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J.,

concurring)). "[S]eparating and dividing" power allows power to check and balance power, and such checks and balances are "the foundation of a structure of government that would protect liberty." Bowsher, 478 U.S. at 722.

15. How would you go about deciding a case in which one branch assumed an authority not granted it by the text of the Constitution?

Response: If confirmed, and such a case came before me, I would proceed as in any case: based on the facts before the Court; the law as set out by the Supreme Court and the Third Circuit; and the parties' arguments.

16. What role should empathy play in a judge's consideration of a case?

Response: I believe that judges should set aside all passions. Empathy often implies identifying closely and emotionally with someone. But that can be a kind of partiality and even pre-judgment, and can threaten a judge's even-handedness. A good judge's critical traits --- fairness, for example, and patience --- must be there in full and equal measure for all. As noted above, in response to Question 1, I believe that a judge should consistently decide each case in the same way: on the facts before the Court; on the law; and based on the parties' arguments. This approach, I believe, helps to ensure lawful treatment of all parties and all claims.

17. What's worse: Invalidating a law that is, in fact, constitutional, or upholding a law that is, in fact, unconstitutional?

Responses: Judges should work to avoid both outcomes. Every failure to decide a case in accord with the Constitution is an error.

18. From 1789 to 1857, the Supreme Court exercised its power of judicial review to strike down federal statutes as unconstitutional only twice. Since then, the invalidation of federal statutes by the Supreme Court has become significantly more common. What do you believe accounts for this change? What are the downsides to the aggressive exercise of judicial review? What are the downsides to judicial passivity?

Response: I was not previously aware of the statistics described above, and I have not studied the referenced phenomena. Accordingly, I have no opinion as to what accounts for the referenced historical change. As to the final two questions, please see my response to Question 17.

19. How would you explain the difference between judicial review and judicial supremacy?

Response: "It is emphatically the province and duty of the judicial department to say what the law is[,]" and as part of that duty judges must sometimes determine whether legislative actions or executive actions are constitutionally valid. Marbury v. Madison, 5 U.S. 137 (1803). That is judicial review. Judicial supremacy is a term

that may mean different things in different contexts. It is, however, often taken to stand for "the principle that the federal judiciary is supreme in the exposition of the law of the Constitution." Cooper v. Aaron, 358 U.S. 1, 18 (1958).

20. Abraham Lincoln explained his refusal to honor the Dred Scott decision by asserting that "If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." How do you think elected officials should balance their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions?

Response: Elected officials might potentially strike this balance in any number of ways, including by pursuing an appeal from a judicial decision or by criticizing a decision. Especially against this backdrop, I do not believe it is appropriate for me to express any personal beliefs as to how elected officials should proceed.

21. In Federalist 78, Hamilton says that the courts are the least dangerous branch because they have neither force nor will, but only judgment. Explain why that's important to keep in mind when judging.

Response: "The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial." INS v. Chadha, 462 U.S. 919, 951 (1983). I understand Federalist 78 to emphasize the importance of that separation. The Judicial branch does not make the laws, the Legislative branch does. The Judicial branch does not enforce the laws, the Executive branch does. This is important to keep in mind when judging because "[t]he declared purpose of separating and dividing the powers of government, of course, was to 'diffus[e] power the better to secure liberty.'" Bowsher v. Synar, 478 U.S. 714, 721 (1986) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). Judges must stay within their prescribed lane in our constitutional system, as must each branch of the government.

22. As a district court judge, you would be bound by both Supreme Court precedent and prior circuit court precedent. What is the duty of a lower court judge when confronted with a case where the precedent in question does not seem to be rooted in constitutional text, history, or tradition and also does not appear to speak directly to the issue at hand? In applying a precedent that has questionable constitutional underpinnings, should a lower court judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: A lower court judge must faithfully apply binding precedent. This is so even if a judge believes that the "underpinnings" of a precedential decision are or have become questionable. See Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

23. When sentencing an individual defendant in a criminal case, what role, if any, should the defendant's group identity(ies) (e.g., race, gender, nationality, sexual orientation or gender identity) play in the judges' sentencing analysis?

Response: None.

24. The Biden Administration has defined "equity" as: "the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality." Do you agree with that definition? If not, how would you define equity?

Response: I am not familiar with the quoted definition. Equity is a term that means different things in different contexts. Black's Law Dictionary defines "equity" as: "[f]airness; impartiality; evenhanded dealing." Black's Law Dictionary (11th ed. 2019).

25. Is there a difference between "equity" and "equality?" If so, what is it?

Response: As to equity, please see my response to Question 24. Black's Law Dictionary defines "equality" as: "[t]he quality, state, or condition of being equal; esp., likeness in power or political status." Black's Law Dictionary (11th Ed. 2019).

26. Does the 14th Amendment's equal protection clause guarantee "equity" as defined by the Biden Administration (listed above in question 24)?

Response: The Equal Protection Clause of the Fourteenth Amendment provides that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." No Supreme Court decision that I am aware of has applied the definition quoted above.

27. How do you define "systemic racism?"

Response: Systemic racism is a term that means different things to different people. Black's Law Dictionary defines "systemic discrimination" to mean "[a]n ingrained culture that perpetuates discriminatory policies and attitudes toward certain classes of people within society." Black's Law Dictionary (11th ed. 2019).

28. How do you define "critical race theory?"

Response: Critical race theory is a term that means different things to different people. Black's Law Dictionary defines "critical race theory" to mean "[a] reform movement within the legal profession, particularly within academia, whose adherents

believe that the legal system has disempowered racial minorities." Black's Law Dictionary (11th ed. 2019).

29. Do you distinguish "critical race theory" from "systemic racism," and if so, how?

Response: The definitions between the terms, as set out in response to Question 27 and Question 28 are different from each other.

SENATOR TED CRUZ
U.S. Senate Committee on the Judiciary

Questions for the Record for Michael Farbiarz, nominated to be United States District Judge for the District of New Jersey

I. Directions

Please provide a wholly contained answer to each question. A question's answer should not cross-reference answers provided in other questions. Because a previous nominee declined to provide any response to discrete subparts of previous questions, they are listed here separately, even when one continues or expands upon the topic in the immediately previous question or relies on facts or context previously provided.

If a question asks for a yes or no answer, please provide a yes or no answer first and then provide subsequent explanation. If the answer to a yes or no question is sometimes yes and sometimes no, please state such first and then describe the circumstances giving rise to each answer.

If a question asks for a choice between two options, please begin by stating which option applies, or both, or neither, followed by any subsequent explanation.

If you disagree with the premise of a question, please answer the question as-written and then articulate both the premise about which you disagree and the basis for that disagreement.

If you lack a basis for knowing the answer to a question, please first describe what efforts you have taken to ascertain an answer to the question and then provide your tentative answer as a consequence of its reasonable investigation. If even a tentative answer is impossible at this time, please state why such an answer is impossible and what efforts you, if confirmed, or the administration or the Department, intend to take to provide an answer in the future. Please further give an estimate as to when the Committee will receive that answer.

To the extent that an answer depends on an ambiguity in the question asked, please state the ambiguity you perceive in the question, and provide multiple answers which articulate each possible reasonable interpretation of the question in light of the ambiguity.

II. Questions

1. **Is racial discrimination wrong?**

Response: Yes, and it is illegal. See, e.g., Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e et seq.

2. **Are there any unenumerated rights in the Constitution, as yet unarticulated by the Supreme Court that you believe can or should be identified in the future?**

Response: When a litigant claims that an unenumerated right, unarticulated by the Supreme Court, is protected under the Due Process Clauses of the Fifth and Fourteenth Amendments, the claim is assessed under Washington v. Glucksberg, 521 U.S. 702 (1997). Glucksberg requires that unenumerated rights be both "deeply rooted in the Nation's history and tradition" and "implicit in the concept of ordered liberty." Id. at 719–21. If confirmed, and confronted with a claim for an unenumerated right that has not been articulated by the Supreme Court, I would assess the claim based on the facts before the Court; controlling law, including the Glucksberg test; and the parties' arguments. What I personally may or may not believe would not be relevant. Personal beliefs have no place in judicial decision-making, and to the extent they exist they must affirmatively be set aside. This is so for many reasons, including to ensure, as the Supreme Court said in Glucksberg, that the law is not "subtly transformed" by judges' "policy preferences." Id. at 720.

3. **How would you characterize your judicial philosophy? Identify which U.S. Supreme Court Justice's philosophy out of the Warren, Burger, Rehnquist, and Roberts Courts is most analogous with yours.**

Response: Each federal judge swears to "administer justice without respect to persons[.]" 28 U.S.C. § 453. My judicial philosophy would be to honor the judicial oath, by deciding each case in precisely the same way: on the facts before the Court; on the law; and based on the parties' arguments.

I have not studied the Justices' individual philosophies. But there are many Justices that I admire deeply. For example, I admire the plainspoken and powerful writing of Justices Kagan and Gorsuch, and I admire the service that Justice Robert Jackson performed for our country when he temporarily stepped away from the Supreme Court to serve as chief United States prosecutor at the Nuremberg war crimes trials.

4. **Please briefly describe the interpretative method known as originalism. Would you characterize yourself as an 'originalist'?**

Response: Originalism is both an interpretive method and a judicial philosophy. It is often understood as the doctrine that "a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed

observer at the time when the text first took effect[,]" Black's Law Dictionary (11th ed. 2019), and it is an unmistakable part of our law. See, e.g., District of Columbia v. Heller, 554 U.S. 570, 605 (2008) ("the public understanding of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation") (emphasis removed).

As to interpretive methods, lower federal court judges are bound to follow the interpretive methods set down by the Supreme Court. I would do so. As to judicial philosophy, each federal judge swears to "administer justice without respect to persons[.]" 28 U.S.C. § 453. My judicial philosophy would be to honor the judicial oath, by deciding each case in precisely the same way: on the facts before the Court; on the law; and based on the parties' arguments.

5. **Please briefly describe the interpretive method often referred to as living constitutionalism. Would you characterize yourself as a 'living constitutionalist'?**

Response: Living constitutionalism is both an interpretive method and a judicial philosophy. It is often understood as the doctrine that "the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." Black's Law Dictionary (11th ed. 2019).

Lower federal court judges are bound to follow the interpretive methods set down by the Supreme Court. I would do so. I am not aware of a context in which the Supreme Court has directed lower federal courts to follow a "living constitutionalism" interpretive method. As to judicial philosophy, each federal judge swears to "administer justice without respect to persons[.]" 28 U.S.C. § 453. My judicial philosophy would be to honor the judicial oath, by deciding each case in precisely the same way: on the facts before the Court; on the law; and based on the parties' arguments.

6. **If you were to be presented with a constitutional issue of first impression— that is, an issue whose resolution is not controlled by binding precedent—and the original public meaning of the Constitution were clear and resolved the issue, would you be bound by that meaning?**

Response: From my experience as a practicing lawyer, I believe that faithful consideration of binding precedents resolves all or virtually all questions that might face a district judge with respect to constitutional interpretation. In the rare instance when that might not be the case, lower federal court judges are bound to follow the interpretive methods set down by the Supreme Court. I would do so. The Supreme Court has stated that "the public understanding of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation." District of Columbia v. Heller, 554 U.S. 570, 605 (2008) (emphasis removed). And the Supreme Court has directed lower federal courts to zero in on historical understandings of the Constitution in a number of areas. See, e.g., Kennedy v. Bremerton, 142 S. Ct. 2407 (2022) (First Amendment, Establishment Clause); New York Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022) (Second Amendment); United States v.

Jones, 565 U.S. 400 (2012) (Fourth Amendment); Crawford v. Washington, 514 U.S. 36 (2006) (Sixth Amendment, Confrontation Clause). In other areas, the Supreme Court has directed lower federal courts to broaden the focus, to consider additional interpretive approaches. See, e.g., Reed v. Town of Gilbert, Ariz., 675 U.S. 155, 163 (2015) (interpreting the First Amendment's Free Speech Clause in light of a narrow tailoring/strict scrutiny test).

7. **Is the public's current understanding of the Constitution or of a statute ever relevant when determining the meaning of the Constitution or a statute? If so, when?**

Response: "[T]he public understanding of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation." District of Columbia v. Heller, 554 U.S. 570, 605 (2008) (emphasis removed); see also, e.g., Bostock v. Clayton Cnty., Georgia, 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."). But Supreme Court precedent sometimes requires consideration of current understandings. For example, the Supreme Court has directed lower federal courts to look to "contemporary community standards," Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 574-75 (2002), in evaluating certain First Amendment claims.

8. **Do you believe the meaning of the Constitution changes over time absent changes through the Article V amendment process?**

Response: The Constitution may be changed only through the amendment process described in Article V. For lower federal court judges, the meaning of the Constitution is fixed by the decisions of the Supreme Court.

9. **Is the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* settled law?**

Response: I am not aware of an established definition of "settled law." The Supreme Court has held that "a precedent of this Court must be followed by the lower federal courts[.]" Hutto v. Davis, 454 U.S. 370, 375 (1982). This is a fundamental rule-of-law principle, and in accord with it all Supreme Court decisions "must be followed" in a faithful manner by lower federal court judges. That is what I would do.

a. **Was it correctly decided?**

Response: Supreme Court nominees, such as now-Justices Barrett and Jackson, have regularly declined to provide a "thumbs-up" or "thumbs-down" as to Supreme Court precedents. Following this approach is especially important for prospective lower federal court judges, who must faithfully follow Supreme Court precedent, and who lack any possible power to alter such precedent. See, e.g., State Oil Co. v. Khan, 522 U.S. 3, 20 (1997); Agostini v. Felton, 521 U.S. 203, 237 (1997).

10. **Is the Supreme Court's ruling in *New York Rifle & Pistol Association v. Bruen* settled law?**

Response: I am not aware of an established definition of "settled law." The Supreme Court has held that "a precedent of this Court must be followed by the lower federal courts[.]" Hutto v. Davis, 454 U.S. 370, 375 (1982). This is a fundamental rule-of-law principle, and in accord with it all Supreme Court decisions "must be followed" in a faithful manner by lower federal court judges. That is what I would do.

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11. **Is the Supreme Court's ruling in *Brown v. Board of Education* settled law?**

Response: I am not aware of an established definition of "settled law." The Supreme Court has held that "a precedent of this Court must be followed by the lower federal courts[.]" Hutto v. Davis, 454 U.S. 370, 375 (1982). This is a fundamental rule-of-law principle, and in accord with it all Supreme Court decisions "must be followed" in a faithful manner by lower federal court judges. That is what I would do.

a. Was it correctly decided?

Response: There is no likelihood that de jure segregation will be re-imposed in American public schools. Accordingly, no federal judge "will have to face the question . . . whether Brown v. Board of Education was rightly decided." Amy Coney Barrett & John Copeland Nagle, Congressional Originalism, 19 U. PA. J. CONST. L. 1, 17 (2016). This question may therefore be answered, consistent with the practices of prior nominees and my ethical obligations. I believe that Brown was correctly decided.

12. **What sort of offenses trigger a presumption in favor of pretrial detention in the federal criminal system?**

Response: Pretrial detention determinations by federal judicial officers are controlled by Title 18, United States Code, Section 3142. Under Section 3142(e)(3), "if the judicial officer finds that there is probable cause to believe that the person committed" an offense listed in Sections 3142(e)(3)(a) through (e), there is a rebuttable presumption in favor of pretrial detention. The listed offenses include, among others, certain enumerated violent crimes. In addition, when a detention hearing is held pursuant to Section 3142(f)(1), if the judicial officer "finds" that each of the conditions set out in

Section 3142(e)(2) have been met, there is also a rebuttable presumption of detention. These conditions focus on whether and when the defendant was convicted of a qualifying crime, and whether that crime was committed while the defendant was on release pending trial.

a. **What are the policy rationales underlying such a presumption?**

Response: I am unaware of any Supreme Court or Third Circuit opinion that describes the referenced policy rationales.

13. **Are there identifiable limits to what government may impose—or may require—of private institutions, whether it be a religious organization like Little Sisters of the Poor or small businesses operated by observant owners?**

Response: Yes. Focusing solely on federal law, there are identifiable statutory limits. For example, the Religious Freedom Restoration Act ("RFRA"), prohibits the "Government [from] substantially burden[ing] a person's exercise of religion" unless it "demonstrates that application of the burden to the person — (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb–1(a), (b). RFRA covers, among other things, closely-held for-profit entities. See Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 719 (2014); see generally 42 U.S. Code § 2000bb–3(a) (RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise").

In addition, there are identifiable constitutional limits. For example, the Supreme Court has held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) (internal quotation marks omitted). But if the law is not neutral, or is not generally applicable, then it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-32 (1993); see also Lasche v. New Jersey, No. 20-2325, 2022 WL 604025, at *5 (3d Cir. Mar. 1, 2022). A law is not neutral if "the object or purpose of the law is suppression of religion or religious conduct[,]" Hialeah, 508 U.S. at 533, for example, or if enforcement of the law was motivated by hostility to religion. See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018); see also Lasche, 2022 WL 604025, at *5. A law is not "generally applicable" if the law provides a mechanism for individual exemptions, see, e.g., Fulton v. City of Phila., 141 S. Ct. 1868, 1877 (2021), see also Lasche, 2022 WL 604025, at *5, for example, or if the law prohibits religious conduct while permitting secular conduct that is comparable in terms of the

governmental interests in play, see Tandon v. Newsom, 141 S. Ct. 1294 (2021). The First Amendment also imposes other limits. For example, the First Amendment "precludes application" of certain legislation "to claims concerning the employment relationship between a religious institution and its ministers[.]" Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 190 (2012).

14. **Is it ever permissible for the government to discriminate against religious organizations or religious people?**

Response: Such discrimination is subject to strict scrutiny, and "will survive strict scrutiny only in rare cases." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).

15. **In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Roman Catholic Diocese of Brooklyn and two Orthodox Jewish synagogues sued to block enforcement of an executive order restricting capacity at worship services within certain zones, while certain secular businesses were permitted to remain open and subjected to different restrictions in those same zones. The religious organizations claimed that this order violated their First Amendment right to free exercise of religion. Explain the U.S. Supreme Court's holding on whether the religious entity-applicants were entitled to a preliminary injunction.**

Response: In Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020), the Supreme Court held that the referenced applicants were entitled to a preliminary injunction. The Court held that the applicants were likely to succeed on the merits of their Free Exercise claim because "the challenged [Covid-19] restrictions . . . must satisfy 'strict scrutiny,'" id. at 67, and an insufficient showing had been made that they were narrowly-tailored enough to satisfy that test, id., because, "[a]mong other things, the maximum attendance [restrictions] at a religious service could be tied to the size of the church or synagogue," and they had not been, id. In addition, the Supreme Court held that "the challenged restrictions, if enforced, will cause irreparable harm[,]" based on "[t]he loss of First Amendment freedoms, for even minimal periods of time[.]" Id. at 67 (internal quotation marks and citations omitted).

16. **Please explain the U.S. Supreme Court's holding and rationale in *Tandon v. Newsom*.**

Response: In Tandon v. Newsom, 141 S. Ct. 1294 (2021), the Supreme Court enjoined California's enforcement of certain Covid-19 restrictions that forbade gathering for at-home religious services. The Court reasoned that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they," like the California restrictions at issue, "treat any comparable secular activity more favorably than religious exercise." Id. at 1296 (emphasis in original). The Court held: that the applicants were likely to succeed on the merits of their claims, id. at 1297, in part because California did not "explain why it could not safely

permit at-home worshipers to gather in larger numbers while using precautions used in secular activities," id.; that the applicants were irreparably harmed by the loss of Free Exercise rights, id.; and that California had failed to show "that public health would be imperiled by employing less restrictive measures" than the complained-of restrictions, id. at (internal quotation marks omitted).

17. **Do Americans have the right to their religious beliefs outside the walls of their houses of worship and homes?**

Response: Yes. See, e.g., Kennedy v. Bremerton, 142 S. Ct. 2407 (2022) (so holding).

18. **Explain your understanding of the U.S. Supreme Court's holding in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.**

Response: A baker refused to create a wedding cake for a same-sex couple, on the ground that doing so would violate his religious beliefs. The couple filed a state law anti-discrimination claim; the baker responded by invoking his constitutional Free Exercise rights; and the relevant state agency resolved the matter in favor of the couple. The Supreme Court held that the record demonstrated "clear and impermissible hostility" on the part of the agency "toward the sincere religious beliefs that motivated [the baker's] objection," Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n, 138 S. Ct. 1719, 1729 (2018). The Court cited both certain language used by the agency and the "disparate," id. at 1732, manner in which the agency treated the baker's case in comparison with other cases. The baker "was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it[.]" Id. Accordingly, the Court invalidated the rulings of both the state agency and the state court that enforced those rulings. Id. at 1732.

19. **Under existing doctrine, are an individual's religious beliefs protected if they are contrary to the teaching of the faith tradition to which they belong?**

Response: "Only beliefs rooted in religion are protected by the Free Exercise Clause." Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 713 (1981). But determining what constitutes such a belief does "not turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Id. at 714. Courts have a "narrow function" in this area: to determine whether the First Amendment claimant has an "honest conviction," id. at 716, not to assess whether that conviction is "reasonable," or how it may line up with religious and/or church doctrine. See Frazee v. Illinois Dept. of Employment Security, 489 U.S. 829, 834 (1989) (rejecting the "notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."); Thomas, 450 U.S. at 716 ("it is not within the judicial function . . . to

inquire whether the petitioner . . . correctly perceived the commands of [his] faith"); cf. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 725 (2014) ("it is not for us to say that their religious beliefs are mistaken or insubstantial"); see also, e.g., Employment Div., Dept. of Human Resources of Or. v. Smith, 494 U.S. 872, 887 (1990).

a. **Are there unlimited interpretations of religious and/or church doctrine that can be legally recognized by courts?**

Response: "Only beliefs rooted in religion are protected by the Free Exercise Clause." Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 713 (1981). But determining what constitutes such a belief does "not turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Id. at 714. Courts have a "narrow function" in this area: to determine whether the First Amendment claimant has an "honest conviction," id. at 716, not to assess whether that conviction is "reasonable," or how it may line up with religious and/or church doctrine. See Frazee v. Illinois Dept. of Employment Security, 489 U.S. 829, 834 (1989) (rejecting the "notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."); Thomas, 450 U.S. at 716 ("it is not within the judicial function . . . to inquire whether the petitioner . . . correctly perceived the commands of [his] faith"); cf. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 725 (2014) ("it is not for us to say that their religious beliefs are mistaken or insubstantial"); see also, e.g., Employment Div., Dept. of Human Resources of Or. v. Smith, 494 U.S. 872, 887 (1990).

b. **Can courts decide that anything could constitute an acceptable "view" or "interpretation" of religious and/or church doctrine?**

Response: "Only beliefs rooted in religion are protected by the Free Exercise Clause." Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 713 (1981). But determining what constitutes such a belief does "not turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Id. at 714. Courts have a "narrow function" in this area: to determine whether the First Amendment claimant has an "honest conviction," id. at 716, not to assess whether that conviction is "reasonable," or how it may line up with religious and/or church doctrine. See Frazee v. Illinois Dept. of Employment Security, 489 U.S. 829, 834 (1989) (rejecting the "notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."); Thomas, 450 U.S. at 716 ("it is not within the judicial function . . . to inquire whether the petitioner . . . correctly perceived the commands of [his] faith"); cf. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 725 (2014) ("it is not for us to say that their religious beliefs are mistaken or insubstantial"); see also, e.g., Employment Div., Dept. of Human Resources of Or. v. Smith, 494 U.S. 872, 887 (1990).

c. **Is it the official position of the Catholic Church that abortion is acceptable and morally righteous?**

Response: I have not studied the Catholic Church's official position with respect abortion.

20. **In *Our Lady of Guadalupe School v. Morrissey-Berru*, the U.S. Supreme Court reversed the Ninth Circuit and held that the First Amendment's Religion Clauses foreclose the adjudication of employment-discrimination claims for the Catholic school teachers in the case. Explain your understanding of the Court's holding and reasoning in the case.**

Response: In Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171 (2012), the Supreme Court confirmed "the existence of a 'ministerial exception,' grounded in the First Amendment, that precludes application of [anti-discrimination] legislation to claims concerning the employment relationship between a religious institution and its ministers." Id. at 188. In Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049 (2020), the Supreme Court held that whether a particular employment relationship falls within the ministerial exception depends on "what an employee does." Id. at 2064. Applying this test, the Supreme Court held that the ministerial exception applies to employees, such as the Our Lady of Guadalupe School claimants, focused on "educating young people in their faith, inculcating its teachings, and training them to live their faith." Id. at 2064.

21. **In *Fulton v. City of Philadelphia*, the U.S. Supreme Court was asked to decide whether Philadelphia's refusal to contract with Catholic Social Services to provide foster care, unless it agrees to certify same-sex couples as foster parents, violates the Free Exercise Clause of the First Amendment. Explain the Court's holding in the case.**

Response: "[L]aws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1876 (2021) (describing the Court's holding in Employment Div., Dept. of Human Resources of Or. v. Smith, 494 U.S. 872 (1990)). But a law is not "generally applicable" if it "invite[s] the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." Id. at 1877 (internal quotation marks omitted). In Fulton, the Supreme Court noted that Philadelphia's approach to foster care procurements "incorporates a system of individual exemptions," id. at 1878-79, and accordingly assessed Philadelphia's refusal to contract for foster care services with Catholic Social Services under a strict scrutiny standard. See id. at 1881. Applying this standard, the Court held that Philadelphia's stated interests --- "maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children," id. at 1881 --- did not justify burdening the Free Exercise rights of Catholic Social Services. Id. at 1881-82.

22. **In *Carson v. Makin*, the U.S. Supreme Court struck down Maine's tuition assistance program because it discriminated against religious schools and thus undermined Mainers' Free Exercise rights. Explain your understanding of the Court's holding and reasoning in the case.**

Response: Maine's tuition assistance program required participating schools to be "nonsectarian." This requirement excluded otherwise-qualified religious schools "on the basis of their religious exercise." Carson v. Makin, 142 S. Ct. 1987, 2002 (2022). The Supreme Court struck down the program, holding that a "[a] State's antiestablishment interest," which Maine had proffered, "does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise." Id. at 1998.

23. **Please explain your understanding of the U.S. Supreme Court's holding and reasoning in *Kennedy v. Bremerton School District*.**

Response: A school district disciplined a football coach "for engaging in a brief, quiet, personal" prayer. Kennedy v. Bremerton School Dist., 142 S. Ct. 2407, 2433 (2022). Concluding that the coach's prayers were not offered while he was "acting within the scope of his duties as a coach," id. at 2424-25, the Court granted summary judgment to the coach on his Free Exercise claim, reasoning that "the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech." Id. at 2433.

24. **Explain your understanding of Justice Gorsuch's concurrence in the U.S. Supreme Court's decision to grant certiorari and vacate the lower court's decision in *Mast v. Fillmore County*.**

Response: The Supreme Court in Mast v. Fillmore County, 141 S. Ct. 2430 (2021), vacated a state court judgment and remanded the case, a Religious Land Use and Institutionalized Persons Act ("RLUIPA") matter, for further consideration in light of Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1878 (2021). Justice Gorsuch concurred to identify issues the state courts "may wish to consider on remand" as to the proper interpretation of RLUIPA. Id. at 2430. For example, Justice Gorsuch stated that the state courts had erred by treating the government's "general interest" in enforcing certain sanitation rules as "'compelling' without reference to the specific application of those rules" to the RLUIPA claimants before the state courts. Id. at 2432.

25. **Some people claim that Title 18, Section 1507 of the U.S. Code should not be interpreted broadly so that it does not infringe upon a person's First Amendment right to peaceably assemble. How would you interpret the statute in the context of the protests in front the homes of U.S. Supreme Court Justices following the *Dobbs* leak?**

Response: If confirmed, and confronted with a case that required interpretation of Title 18, United States Code, Section 1507 in light of its constitutionality, I would assess the matter based on: the facts before the Court; the governing law, including, as appropriate, Cox v. Louisiana, 379 U.S. 559 (1965), which upheld an arguably analogous state statute against a First Amendment challenge; and the parties' arguments.

26. **Would it be appropriate for the court to provide its employees trainings which include the following:**

a. **One race or sex is inherently superior to another race or sex;**

Response: No.

b. **An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive;**

Response: No.

c. **An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; or**

Response: No.

d. **Meritocracy or related values such as work ethic are racist or sexist?**

Response: No.

27. **Will you commit that your court, so far as you have a say, will not provide trainings that teach that meritocracy, or related values such as work ethic and self-reliance, are racist or sexist?**

Response: I am not aware of the trainings that might or might not be offered. If confirmed, I would not support such trainings.

28. **Will you commit that you will not engage in racial discrimination when selecting and hiring law clerks and other staff, should you be confirmed?**

Response: Yes.

29. **Is it appropriate to consider skin color or sex when making a political appointment? Is it constitutional?**

Response: Claims of discrimination in hiring by federal, state, or local governments on the basis of race or sex are routinely pressed in federal court. Against that backdrop, I believe that I should not provide any views that I may or may not have as to when, if

ever, it is appropriate and lawful to consider race and sex in hiring. Among other things, doing so could be (erroneously) understood to suggest how I might think about future litigants and their cases. Litigants are entitled to an open-minded and case-by-case Judge, who studies their arguments fairly, in light of the particular facts of their case and then-current law, and does not reach any conclusions before doing so.

30. **Is the criminal justice system systemically racist?**

Response: Claims of racial discrimination as to various aspects of the criminal justice system are routinely pressed in federal court, and some invoke "systematic[] racism" or "systemic racism." Against that backdrop, I believe that I should not provide any views that I may or may not have as to when, if ever, it is appropriate and lawful to consider race and sex in hiring. Among other things, doing so could be (erroneously) understood to suggest how I might think about future litigants and their cases. Litigants are entitled to an open-minded and case-by-case Judge, who studies their arguments fairly, in light of the particular facts of their case and then-current law, and does not reach any conclusions before doing so.

31. **President Biden has created a commission to advise him on reforming the U.S. Supreme Court. Do you believe that Congress should increase, or decrease, the number of justices on the U.S. Supreme Court? Please explain.**

Response: This is not an issue that I have studied.

32. **In your opinion, are any currently sitting members of the U.S. Supreme Court illegitimate?**

Response: No. Each currently sitting Justice was nominated by the President and confirmed by the United States Senate, as required by Article II of the Constitution.

33. **What do you understand to be the original public meaning of the Second Amendment?**

Response: Applying the Constitution's original public meaning, the Supreme Court has held that the Second Amendment "protect[s] an individual right to armed self-defense[.]" New York Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2128 (2022).

34. **What kinds of restrictions on the Right to Bear Arms do you understand to be prohibited by the U.S. Supreme Court's decisions in *United States v. Heller*, *McDonald v. Chicago*, and *New York State Rifle & Pistol Association v. Bruen*?**

Response: When the text of the Second Amendment covers an individual's firearms-related conduct, that conduct is "presumptively constitutional." New York Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2126 (2022). To justify a regulation on such conduct, the government must show "that the regulation is consistent with this

Nation's historical tradition of firearm regulation." Id. (citations omitted). The Supreme Court has stated, as to "legislative assemblies, polling places, and courthouses," that "[w]e . . . can assume it settled that these locations were 'sensitive places' where arms carrying could be prohibited consistent with the Second Amendment." Id. at 2133. The Supreme Court has further stated that "courts can use analogies to those historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in new and analogous sensitive places are constitutionally permissible." Id.; see also District of Columbia v. Heller, 554 U.S. 570, 626-27 (2008) (noting other "longstanding prohibitions" on firearms).

35. **Is the ability to own a firearm a personal civil right?**

Response: Yes. See District of Columbia v. Heller, 554 U.S. 570 (2008).

36. **Does the right to own a firearm receive less protection than the other individual rights specifically enumerated in the Constitution?**

Response: "The constitutional right to bear arms in public for self defense is not a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." New York Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2156 (2022) (internal quotation marks and citation omitted).

37. **Does the right to own a firearm receive less protection than the right to vote under the Constitution?**

Response: "The constitutional right to bear arms in public for self defense is not a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." New York Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2156 (2022) (internal quotation marks and citation omitted).

38. **Is it appropriate for the executive under the Constitution to refuse to enforce a law, absent constitutional concerns? Please explain.**

Response: If confirmed, and confronted with a case that required consideration of this question, I would assess the matter based on the facts before the Court; the governing law, including, as appropriate, Heckler v. Chaney, 470 U.S. 821, 831 (1985), which holds that the federal Executive Branch's decision "not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion," id. at 831; and the parties' arguments.

39. **Explain your understanding of what distinguishes an act of mere 'prosecutorial discretion' from that of a substantive administrative rule change.**

Response: Prosecutorial discretion generally refers to the discretion vested in a prosecutor to initiate or not to initiate enforcement proceedings. A substantive administrative rule change is a change to a rule.

40. **Does the President have the authority to abolish the death penalty?**

Response: The federal death penalty is reflected in a statute, Title 18, United States Code, Section 3591, and the President does not have the power to unilaterally abolish federal statutes.

41. **Explain the U.S. Supreme Court's holding on the application to vacate stay in *Alabama Association of Realtors v. HHS.***

Response: The federal Health and Human Services agency imposed a moratorium on evictions in areas experiencing certain levels of Covid-19 transmission, citing particular provisions of a statute. The Supreme Court held that: the agency's reading of the statute was "unprecedented," Alabama Association of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021), and that the statute did not provide the clear Congressional authorization required to permit the agency "to exercise powers of 'vast economic and political significance.'" Id. at 2489 (citations omitted).

42. **Do judges need to undergo implicit bias training?**

Response: I am not aware of whether such trainings exist or whether they are mandatory.

43. **Are there instances where a judge should not honor the judicial code of conduct?**

Response: No.

a. **If so, can you please identify all instances?**

b. **What justifies a departure from the judicial code of conduct?**

Senator Josh Hawley
Questions for the Record

Michael Farbiarz
Nominee, U.S. District Court for the District of New Jersey

1. **Then-Judge Ketanji Brown Jackson made a practice of refusing to apply several enhancements in the Sentencing Guidelines when sentencing child pornography offenders. Please explain whether you agree with each of the following Guidelines enhancements and whether, if you are confirmed, you intend to use them to increase the sentences imposed on child pornography offenders.**

   Response: Federal sentencing involves a number of steps: (1) gathering of factual information as to the offense and the defendant by the United States Probation Office, see Fed. R. of Crim. Pr. 32(c); (2) reviewing the Presentence Report and assessing any objections to it, see id. 32(c)-(g); (3) calculating the applicable United States Sentencing Guidelines, see United States v. Jackson, 862 F.3d 365, 370 (3d Cir. 2017); (4) considering counsel's arguments; (5) affording victims, see 18 U.S.C. § 3771(a)(4), and the defendant, see Fed. R. of Crim. Pr. 32(i) (4)(a)(ii), an opportunity to be heard; and then (5) imposing sentence in light of the factors set out in Title 18, United States Code, Section 3553(a). See generally United States v. Tomko, 562 F.3d 558, 567-69 (3d Cir. 2009) (en banc) (describing the sentencing process). "[I]mproperly calculating[] the Guidelines range" is a "significant . . . error," Gall v. United States, 552 U.S. 38, 51 (2007), and in each case I would work to accurately calculate each relevant aspect of the Guidelines, including applicable enhancements. I would do so in light of the facts that have been developed through the sentencing process described above; the law that controls application of a particular Guideline; and the arguments of the parties. It is not possible to say, now, the impact that a given Guideline might have on the ultimate sentence imposed in a particular case. Among other reasons, this is because after the Guidelines are calculated the sentence is imposed in light of Title 18, United States Code, Section 3553(a), see Tomko, 562 F.3d at 567-69, and under Section 3553(a) judges "shall" sentence based on information about the details of the offense of conviction and the history of the defendant. See 18 U.S.C. § 3553(a)(1). This is necessarily case-specific information, and it cannot be known in advance or in the abstract.

   a. **The enhancement for material that involves a prepubescent minor or a minor who had not attained the age of 12 years**

      Response: Please see my Response to Question 1.

   b. **The enhancement for material that portrays sadistic or masochistic conduct or other depictions of violence**

Response: Please see my Response to Question 1.

c. The enhancement for offenses involving the use of a computer

Response: Please see my Response to Question 1.

d. The enhancements for the number of images involved

Response: Please see my Response to Question 1.

2. Federal law currently has a higher penalty for distribution or receipt of child pornography than for possession. It's 5-20 years for receipt or distribution. It's 0-10 years for possession. The Commission has recommended that Congress align those penalties, and I have a bill to do so.

a. Do you agree that the penalties should be aligned?

Response: I am aware that this issue has been the subject of analysis by the United States Sentencing Commission and that policymakers have considered it. "It is Congress's job to enact policy," and it is a judge's "job to follow the policy Congress has prescribed." SAS Institute, Inc. v. Iancu, 138 S. Ct. 1348, 1358 (2018). If confirmed, I would apply the law and the Guidelines as they are; judges and judicial nominees should, I believe, leave policymaking questions to policymakers.

b. If so, do you think the penalty for possession should be increased, receipt and distribution decreased, or a mix?

Response: Please see my Response to Question 2(a).

c. If an offender before you is charged only with possession even though uncontested evidence shows the offender also committed the crime of receiving child pornography, will you aim to sentence the offender to between 5 and 10 years?

Response: I would aim to sentence all offenders using the case-by-case process set out in response to Question 1. It would short-circuit that process to pre-judge what the sentence should be in a class of cases.

3. Justice Marshall famously described his philosophy as "You do what you think is right and let the law catch up."

a. Do you agree with that philosophy?

Response: I do not how Justice Marshall would have described his overarching judicial philosophy. Each federal judge swears to "administer justice without respect to persons[.]" 28 U.S.C. § 453. My judicial philosophy would be to honor the judicial oath, by consistently deciding each case in the same way: on the facts before the Court; on the law; and based on the parties' arguments.

b. If not, do you think it is a violation of the judicial oath to hold that philosophy?

Response: I do not know how Justice Marshall understood his judicial oath and acted on it. The judicial oath requires judges to "faithfully . . . discharge and perform all the duties incumbent upon" them, 28 U.S.C. § 453, and one "duty of the judicial department" is "to say what the law is[,]" Marbury v. Madison, 5 U.S. 137 (1803).

4. Do you believe that the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* is settled law?

Response: I am not aware of an established definition of "settled law." The Supreme Court has held that "a precedent of this Court must be followed by the lower federal courts[.]" Hutto v. Davis, 454 U.S. 370, 375 (1982). This is a fundamental rule-of-law principle, and in accord with it all Supreme Court decisions "must be followed" in a faithful manner by lower federal court judges. That is what I would do.

5. What is the standard for each kind of abstention in the court to which you have been nominated?

Response: There are six major doctrines that cover matters related to federal abstention.

First, the Pullman doctrine comes into play when a federal constitutional challenge is raised as to a state's action. When such a challenge presents an uncertain state law issue that could be dispositive, such that resolving the state law issue could avoid the need to reach the federal constitutional issue, federal court abstention may be appropriate. See R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 498–501 (1941). In the Third Circuit, "[t]he first step in the Pullman analysis is to determine whether three special circumstances exist: (1) Uncertain issues of state law underlying the federal constitutional claims brought in federal court; (2) State law issues amenable to a state court interpretation that would obviate the need for, or substantially narrow, the scope of adjudication of the constitutional claims; (3) A federal court's erroneous construction of state law would be disruptive of important state policies. If the district court finds that all three of the 'special circumstances' are present, it must then make a discretionary determination as to whether abstention is in fact appropriate under the circumstances of the particular case, based on the weight of these criteria and other relevant factors." Chez

Sez III Corp. v. Twp. of Union, 945 F.2d 628, 631 (3d Cir. 1991) (internal quotation marks and citations omitted).

Second, the Burford doctrine applies when federal court consideration of an issue arising from a state regulatory scheme "so clearly involves basic problems of [state] policy that equitable discretion should be exercised to give the [state] courts the first opportunity to consider them." Burford v. Sun Oil Co., 319 U.S. 315, 332 (1943); see also Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28 (1959). In the Third Circuit, "Burford abstention calls for a two-step analysis. The first question is whether timely and adequate state-court review is available. Only if a district court determines that such review is available, should it turn to the other issues and determine if the case before it involves difficult questions of state law impacting on the state's public policy or whether the district court's exercise of jurisdiction would have a disruptive effect on the state's efforts to establish a coherent public policy on a matter of important state concern." Riley v. Simmons, 45 F.3d 764, 771 (3d Cir. 1995) (internal quotation marks and citation omitted).

Third, the Younger doctrine generally forbids a federal court from enjoining ongoing state criminal and similar enforcement proceedings out of "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." Younger v. Harris, 401 U.S. 37, 44 (1971). In the Third Circuit, Younger abstention is generally appropriate "when federal litigation threatens to interfere with one of three classes of cases: (1) state criminal prosecutions, (2) state civil enforcement proceedings, and (3) state civil proceedings involving orders in furtherance of the state courts' judicial function." ACRA Turf Club, LLC v. Zanzuccki, 748 F.3d 127, 138 (3d Cir. 2014).

Fourth, the Colorado River doctrine concerns abstaining in favor of a concurrent state court proceeding based on considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." Colorado River Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) (citation omitted). In the Third Circuit, "cases are parallel so as to justify abstention under Colorado River when they involve the same parties and claims." Trent v. Dial Med. of Fla., Inc., 33 F.3d 217, 223 (3d Cir. 1994). In a case "in which Colorado River abstention may be appropriate, . . . The factors which govern a district court's exercise of discretion in deciding whether to abstain . . . are: (1) Which court first assumed jurisdiction over property involved, if any; (2) Whether the federal forum is inconvenient; (3) The desirability of avoiding piecemeal litigation; (4) The order in which the respective courts obtained jurisdiction; (5) Whether federal or state law applies; and (6) Whether the state court proceeding would adequately protect the federal plaintiff's rights." Id. at 225.

Fifth, the Brillhart/Wilton doctrine applies when a plaintiff seeks federal declaratory relief and there is a pending state-court action. See Brillhart v. Excess Ins. Co. of Am., 316 U.S. 491, 494 (1942); Wilton v. Seven Falls Co., 515 U.S. 277, 282 (1995). In the Third Circuit, "[c]ourts should give the following and other factors meaningful consideration . . . : (1) the likelihood that a federal court declaration will resolve the uncertainty of obligation which gave rise to the controversy; (2) the convenience of the parties; (3) the public interest in settlement of the uncertainty of obligation; (4) the availability and relative convenience of other remedies; (5) a general policy of restraint when the same issues are pending in a state court; (6) avoidance of duplicative litigation; (7) prevention of the use of the declaratory action as a method of procedural fencing or as a means to provide another forum in a race for res judicata; and (8) (in the insurance context), an inherent conflict of interest between an insurer's duty to defend in a state court and its attempt to characterize that suit in federal court as falling within the scope of a policy exclusion." Kelly v. Maxum Specialty Ins. Grp., 868 F.3d 274, 282–83 (3d Cir. 2017) (internal quotation marks and citation omitted).

Sixth, under the Rooker-Feldman doctrine, federal courts generally do not hear "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005); see generally Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983). In the Third Circuit, "[t]here are four requirements that must be met for the Rooker–Feldman doctrine to apply: (1) the federal plaintiff lost in state court; (2) the plaintiff complain[s] of injuries caused by [the] state-court judgments; (3) those judgments were rendered before the federal suit was filed; and (4) the plaintiff is inviting the district court to review and reject the state judgments." Great W. Mining & Min. Co. v. Fox Rothschild LLP, 615 F.3d 159, 166 (3d Cir. 2010) (internal quotation marks omitted).

6. **Have you ever worked on a legal case or representation in which you opposed a party's religious liberty claim?**

   Response: Not that I recall.

   a. **If so, please describe the nature of the representation and the extent of your involvement. Please also include citations or reference to the cases, as appropriate.**

7. **What role should the original public meaning of the Constitution's text play in the courts' interpretation of its provisions?**

   Response: The "public understanding of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation[.]" District of Columbia v. Heller, 554 U.S. 570, 605 (2008) (emphasis omitted).

8. Do you consider legislative history when interpreting legal texts?

Response: If confirmed and confronted with a statutory interpretation matter, I would first determine whether there is any binding Supreme Court or Third Circuit precedent that resolves the issue presented. If not, I would look to "the statutory text, not the legislative history or any other extrinsic material," Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005), and would focus on interpreting the "statute in accord with the ordinary public meaning of its terms at the time of its enactment." Bostock v. Clayton County, Georgia, 140 S. Ct. 1731, 1739 (2020). If the statutory text is ambiguous under binding precedent, see, e.g., In re Price, 370 F.3d 362, 369 (3d Cir. 2004) ("a provision is ambiguous when, despite a studied examination of the statutory context, the natural reading of a provision remains elusive"), I would look to other interpretive tools, to the extent doing so is authorized by Supreme Court and Third Circuit precedent. These tools might include application of certain canons of construction. If ambiguity persists, I would consider the statute's legislative history, with a focus on those parts of the legislative history identified by the Supreme Court and Third Circuit as more reliable. Compare, e.g., Garcia v. United States, 469 U.S. 70, 76 (1984) (describing more reliable sources) with NLRB v. SW Gen., Inc., 137 S. Ct. 929, 943 (2017) (warning that "floor statements by individual legislators rank among the least illuminating forms of legislative history").

a. If so, do you treat all legislative history the same or do you believe some legislative history is more probative of legislative intent than others?

Response: Please see my response to Question 8.

b. When, if ever, is it appropriate to consult the laws of foreign nations when interpreting the provisions of the U.S. Constitution?

Response: The Supreme Court has looked to early English precedents in interpreting various constitutional provisions. See, e.g., New York Rifle & Pistol Assoc. v. Bruen, 142 S. Ct. 2111, 2135-42 (2022); Crawford v. Washington, 541 U.S. 36, 42-61 (2004). The Supreme Court has also held that "the laws of other countries" are "instructive," but not "controlling," for interpreting "the Eighth Amendment's prohibition of 'cruel and unusual punishments.'" Roper v. Simmons, 543 U.S. 551, 575 (2005). I am not aware of other contexts in which the Supreme Court has determined that courts should examine the law of foreign nations when interpreting the Constitution.

9. Under the precedents of the Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard that applies to a claim that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment?

Response: "A death row inmate may attempt to show that a State's planned method of execution, either on its face or as applied to him, violates the Eighth Amendment's prohibition on cruel and unusual punishment. To succeed on that claim, . . . he must satisfy two requirements. First, he must establish that the State's method of execution presents a 'substantial risk of serious harm' --- severe pain over and above death itself. Second, . . . he 'must identify an alternative [method] that is feasible, readily implemented, and in fact significantly reduce[s]' the risk of harm involved." Nance v. Ward, 142 S. Ct. 2214, 2219–20 (2022) (internal quotation marks and citations omitted).

10. Under the Supreme Court's holding in *Glossip v. Gross*, 135 S. Ct. 824 (2015), is a petitioner required to establish the availability of a "known and available alternative method" that has a lower risk of pain in order to succeed on a claim against an execution protocol under the Eighth Amendment?

Response: Yes.

11. Has the Supreme Court or the U.S. Court of Appeals for the Circuit to which you have been nominated ever recognized a constitutional right to DNA analysis for habeas corpus petitioners in order to prove their innocence of their convicted crime?

Response: The Supreme Court has held that a habeas corpus petitioner has no "freestanding right to access DNA evidence for testing" under the Due Process Clause, District Attorney's Office for the Third Jud. Dist. v. Osborne, 557 U.S. 52, 73-74 (2009), and so has the Third Circuit, see Grier v. Klem, 591 F.3d 672, 678 (3d Cir. 2010).

12. Do you have any doubt about your ability to consider cases in which the government seeks the death penalty, or habeas corpus petitions for relief from a sentence of death, fairly and objectively?

Response: No.

13. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a facially neutral state governmental action is a substantial burden on the free

exercise of religion? Please cite any cases you believe would be binding precedent.

Response: I understand this question to focus on federal constitutional claims, and not on statutory claims under, for example, the Religious Freedom Restoration Act or the Religious Land Use and Institutionalized Persons Act.

The Supreme Court has held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) (internal quotation marks omitted). But if the law is not neutral, or is not generally applicable, then it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-32 (1993); see also Lasche v. New Jersey, No. 20-2325, 2022 WL 604025, at *5 (3d Cir. Mar. 1, 2022). A law is not neutral if "the object or purpose of the law is suppression of religion or religious conduct[,]" Hialeah, 508 U.S. at 533, for example, or if enforcement of the law was motivated by hostility to religion. See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018); see also Lasche, 2022 WL 604025, at *5. A law is not "generally applicable" if the law provides a mechanism for individual exemptions, see, e.g., Fulton v. City of Phila., 141 S. Ct. 1868, 1877 (2021), see also Lasche, 2022 WL 604025, at *5, for example, or if the law prohibits religious conduct while permitting secular conduct that is comparable in terms of the governmental interests in play, see Tandon v. Newsom, 141 S. Ct. 1294 (2021).

In addition to the above, the Free Exercise Clause prohibits enforcement of certain employment laws, to avoid interference with a religious institution's employment of certain of its employees. See, e.g., Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012); see also Lee v. Sixth Mount Zion Baptist Church of Pittsburgh, 903 F.3d 113 (3d Cir. 2018) (applying ministerial exception).

14. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a state governmental action discriminates against a religious group or religious belief? Please cite any cases you believe would be binding precedent.

Response: Please see my response to Question 13.

15. What is the standard in the U.S. Court of Appeals for the Circuit to which you have been nominated for evaluating whether a person's religious belief is held sincerely?

Response: "Only beliefs rooted in religion are protected by the Free Exercise Clause." Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 713 (1981); see also DeHart v. Horn, 227 F.3d 47, 56 (3d Cir. 2000) (en banc). But determining what constitutes such a belief does "not turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection," Thomas, 450 U.S. at 714. In addition, sincerely-held religious beliefs need not "mandate[e]" particular conduct for the conduct to merit First Amendment protection. See Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 171 (3d Cir. 2002). Courts have a "narrow function" in this area: to determine whether the First Amendment claimant has an "honest conviction," id. at 716, not to assess whether that conviction is "reasonable," or how it may line up with religious and/or church doctrine. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 724 (2014); see also, e.g., Employment Div., Dept. of Human Resources of Or. v. Smith, 494 U.S. 872, 887 (1990); Frazee v. Illinois Dept. of Employment Security, 489 U.S. 829, 834 (1989) (rejecting the "notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."); Thomas, 450 U.S. at 716 ("it is not within the judicial function . . . to inquire whether the petitioner . . . correctly perceived the commands of [his] faith").

16. The Second Amendment provides that, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

a. What is your understanding of the Supreme Court's holding in *District of Columbia v. Heller*, 554 U.S. 570 (2008)?

Response: In District of Columbia v. Heller, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment protects an individual right to "keep and bear Arms," including the right to keep a usable handgun at home for self-defense. See id. at 629. Based on this holding, the Court struck down certain District of Columbia laws. See id. at 629.

b. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Second Amendment or any analogous state law? If yes, please provide citations to or copies of those decisions.

Response: No.

17. Dissenting in *Lochner v. New York*, Justice Oliver Wendell Holmes, Jr. wrote that, "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." 198 U.S. 45, 75 (1905).

a. What do you believe Justice Holmes meant by that statement, and do you agree with it?

Response: I believe Justice Holmes meant that a judge's personal opinion as to certain approaches to economic policy "ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." Lochner v. New York, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting). I agree.

b. Do you believe that *Lochner v. New York*, 198 U.S. 45 (1905), was correctly decided? Why or why not?

Response: Lochner was overruled by West Coast Hotel v. Parrish, 300 U.S. 379 (1937) and Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).

18. Are there any Supreme Court opinions that have not been formally overruled by the Supreme Court that you believe are no longer good law?

a. If so, what are they?

Response: Some Supreme Court opinions have been overruled not by the Supreme Court, but by a statute or an amendment to the Constitution. An example is Dred Scott v. Sandford, 60 U.S. 393 (1857), which was abrogated by the Reconstruction Amendments. In addition, the Supreme Court has stated that Korematsu v. United States, 323 U.S. 214 (1944), "was gravely wrong the day it was decided," and "has been overruled in the court of history." Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

b. With those exceptions noted, do you commit to faithfully applying all other Supreme Court precedents as decided?

Response: Yes.

19. Judge Learned Hand famously said 90% of market share "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not." *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

a. Do you agree with Judge Learned Hand?

Response: I have not studied Judge Hand's views with respect to monopolies, or the history of the ALCOA case. In addition, I do not have an understanding of the state of Second Circuit law when the case was decided. I do not have a personal view on Judge Hand's statement.

b. If not, please explain why you disagree with Judge Learned Hand.

Response: Please see my response to Question 19(a).

c. What, in your understanding, is in the minimum percentage of market share for a company to constitute a monopoly? Please provide a numerical answer or appropriate legal citation.

Response: Market share is an aspect of monopoly power, and monopoly power is one of the two elements of the offense of monopoly under Section 2 of the Sherman Act. See, e.g., United States v. Grinnell Corp., 384 U.S. 563, 570-571 (1966). The Supreme Court has not set an across-the-board minimum percentage of market share in this context --- "no magic inheres in numbers," the Court has stated, and the "relative effect of percentage command of a market varies with the setting in which that factor is placed." Times-Picayune Publishing Corporation v. United States, 345 U.S. 594, 612 (1953). If confirmed, and confronted with a case that requires me to assess the significance of a given percentage of market share for Sherman Act purposes, I would examine, among other things, all of the applicable case law. See, e.g., Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 452, 481 (1992) (company "controls nearly 100% of the parts market and 80% to 95% of the service market, with no readily available substitutes"); Grinnell, 384 U.S. at 571 (87% of market share); American Tobacco Co. v. United States, 328 U.S. 781, 797 (1946) (over two-thirds of the market).

20. Please describe your understanding of the "federal common law."

Response: The Constitution "vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States." Rodriguez v. Fed. Deposit Ins. Corp., 140 S. Ct. 713, 717 (2020) (citations omitted). Accordingly, "[j]udicial lawmaking in the form of federal common law plays a necessarily modest role," id., and the Supreme Court has held that there is "no federal general common law." Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). This said, there are "limited areas . . . in which federal judges may appropriately craft the rule of decision," such as "admiralty disputes and certain controversies between States." Rodriguez, 140 S. Ct. at 717. In addition, there are certain areas where Congress has directed federal courts to engage in common law-making. See, e.g., Textile Workers Union of

America v. Lincoln Mills, 353 U.S. 448 (construing Labor Management Relations Act of 1947).

21. If a state constitution contains a provision protecting a civil right and is phrased identically with a provision in the federal constitution, how would you determine the scope of the state constitutional right?

Response: I would determine the scope of any state constitutional provision by consulting the opinion or opinions of the state's highest court. See Wainwright v. Goode, 464 U.S. 78, 84 (1983) ("the views of the state's highest court with respect to state law are binding on the federal courts").

a. Do you believe that identical texts should be interpreted identically?

Response: I understand this question to focus on interpretation of a state constitutional provision that is identical to a federal constitutional provision. In such a situation, I would determine the meaning of the state constitutional provision by consulting the opinion or opinions of the state's highest court. See Wainwright v. Goode, 464 U.S. 78, 84 (1983) ("the views of the state's highest court with respect to state law are binding on the federal courts").

b. Do you believe that the federal provision provides a floor but that the state provision provides greater protections?

Response: Certain federal constitutional protections are binding on the states. States may opt to provide greater protections under their own constitutions. See, e.g., PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980); Cooper v. State of California, 386 U.S. 58, 68 (1967). This is their choice. See id; see, e.g., State v. Johnson, 68 N.J. 349, 353, 346 A.2d 66, 67-68 (1975) (interpreting provision of the New Jersey Constitution to provide greater protection than the identically-worded provision of the United States Constitution).

22. Do you believe that *Brown v. Board of Education*, 347 U.S. 483 (1954), was correctly decided?

Response: There is no likelihood that de jure segregation will be re-imposed in American public schools. Accordingly, no federal judge "will have to face the question . . . whether Brown v. Board of Education was rightly decided." Amy Coney Barrett & John Copeland Nagle, Congressional Originalism, 19 U. PA. J. CONST. L. 1, 17 (2016). This question may therefore be answered, consistent with

the practices of prior nominees and my ethical obligations. I believe that Brown was correctly decided.

23. Do federal courts have the legal authority to issue nationwide injunctions?

Response: Federal Rule of Civil Procedure 65 authorizes a federal court to issue injunctions, and the Supreme Court has affirmed the issuance of a nationwide injunction. See Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2088–89 (2017). This said, a federal court's equitable power is constrained by the historical limits on equity, see Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318-319 (1999), and an "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 165 (2010). Injunctive relief "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." Califano v. Yamasaki, 442 U.S. 682, 702 (1979); see also, e.g., Free Speech Coal., Inc. v. Att'y Gen. United States, 974 F.3d 408, 430 (3d Cir. 2020) (vacating a District Court's imposition of a nationwide injunction, and holding that "[i]njunctive relief should be no broader than necessary to provide full relief to the aggrieved party") (internal quotation marks removed). If confirmed, and presented with a request for the imposition of a nationwide injunction, I would assess the matter based on the facts before the Court; the governing law; and the parties' arguments.

a. If so, what is the source of that authority?

Response: Please see my response to Question 23 above.

b. In what circumstances, if any, is it appropriate for courts to exercise this authority?

Response: Please see my response to Question 23 above.

24. Under what circumstances do you believe it is appropriate for a federal district judge to issue a nationwide injunction against the implementation of a federal law, administrative agency decision, executive order, or similar federal policy?

Response: Please see my response to Question 23 above.

25. What is your understanding of the role of federalism in our constitutional system?

Response: "Our federalist structure of joint sovereigns . . . assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous

society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." Gregory v. Ashcroft, 501 U.S. 452, 458 (1991). In addition, "the federalist system is a check on abuses of government power[;]" "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." Id.

26. Under what circumstances should a federal court abstain from resolving a pending legal question in deference to adjudication by a state court?

Response: "[F]ederal courts ordinarily should entertain and resolve on the merits an action within the scope of a jurisdictional grant," but there are "certain instances in which the prospect of undue interference with state proceedings counsels against federal relief." Sprint Communications, Inc. v. Jacobs, 571 U.S. 69, 72–73 (2013). The major such "instances" are described in my response to Question 5 above.

27. What in your view are the relative advantages and disadvantages of awarding damages versus injunctive relief?

Response: An "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course[,]" Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 165 (2010), and "[w]hether an injunction is warranted in any particular case depends on a variety of factors, including irreparable injury and inadequacy of legal remedies." Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 542 (1987) (internal quotation marks omitted). The advantages and disadvantages of different forms of relief are highly fact-specific, and depend on the particular circumstances of the case in which they arise.

28. **What is your understanding of the Supreme Court's precedents on substantive due process?**

Response: Based on substantive due process, the Supreme Court has held that the Constitution protects certain rights that are not expressly enumerated, including, for example: the right to interracial marriage, Loving v. Virginia, 388 U.S. 1 (1967); the right to direct the education of one's children, Meyer v. Nebraska, 262 U.S. 390 (1923), Pierce v. Society of Sisters, 268 U.S. 510 (1925); the right of adults to engage in private, consensual sexual acts, Lawrence v. Texas, 539 U.S. 558 (2003); and the right to marry a person of the same sex, Obergefell v. Hodges, 576 U.S. 644 (2015). See generally Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2257-58 (2022) (setting out a fuller list); see also, e.g., TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443, 453-54 (1993) ("the Due Process Clause of the Fourteenth

Amendment imposes substantive limits" on civil punitive damages). When a litigant claims that a right, not previously recognized by the Supreme Court, is protected by substantive due process, that claim is assessed under Washington v. Glucksberg, 521 U.S. 702 (1997), which requires that unenumerated rights be both "deeply rooted in the Nation's history and tradition" and "implicit in the concept of ordered liberty." Id. at 719–21.

29. The First Amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

a. **What is your view of the scope of the First Amendment's right to free exercise of religion?**

Response: Please see my response to Question 13.

b. Is the right to free exercise of religion synonymous and coextensive with freedom of worship? If not, what else does it include?

Response: The Free Exercise Clause protects "not only belief and profession but the performance of (or abstention from) physical acts[.]" Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 878 (1990); see also, e.g., Kennedy v. Bremerton School District, 142 S. Ct. 2407, 2421 (2022) (the Free Exercise Clause "protects religious exercises, whether communicative or not," and "does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts") (quotation marks and citations omitted).

c. What standard or test would you apply when determining whether a governmental action is a substantial burden on the free exercise of religion?

Response: Please see my response to Question 13.

d. Under what circumstances and using what standard is it appropriate for a federal court to question the sincerity of a religiously held belief?

Response: Please see my response to Question 15.

e. Describe your understanding of the relationship between the Religious Freedom Restoration Act and other federal laws, such as those governing areas like employment and education?

Response: The Religious Freedom Restoration Act "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a).

f. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Religious Freedom Restoration Act, the Religious Land use and Institutionalized Person Act, the Establishment Clause, the Free Exercise Clause, or any analogous state law? If yes, please provide citations to or copies of those decisions.

Response: No.

30. Justice Scalia said, "The judge who always likes the result he reaches is a bad judge."

a. What do you understand this statement to mean?

Response: Judges must resolve each case based on the facts, the law, and the parties' arguments, not their personal preferences or opinions.

31. Have you ever taken the position in litigation or a publication that a federal or state statute was unconstitutional?

Response: No.

a. If yes, please provide appropriate citations.

32. Since you were first contacted about being under consideration for this nomination, have you deleted or attempted to delete any content from your social media? If so, please produce copies of the originals.

Response: No. I do not have, and have never had, social media accounts.

33. Do you believe America is a systemically racist country?

Response: Claims of discrimination on the basis of race are routinely pressed in federal court, and some invoke "systemic[]" or "systematic" racism. Against that backdrop, I believe that I should not provide any views that I may or may not have as to the referenced question. Among other things, doing so could be (erroneously) understood to suggest how I might think about future litigants and their cases.

Litigants are entitled to an open-minded and case-by-case judge, who studies their arguments fairly, in light of the particular facts of their case and then-current law, and does not reach any conclusions before doing so.

34. Have you ever taken a position in litigation that conflicted with your personal views?

Response: Yes.

35. How did you handle the situation?

Response: My obligation was to represent the interests of my client and I did so.

36. If confirmed, do you commit to applying the law written, regardless of your personal beliefs concerning the policies embodied in legislation?

Response: Yes, provided the legislation is constitutional.

37. Which of the Federalist Papers has most shaped your views of the law?

Response: Number 10.

38. Do you believe that an unborn child is a human being?

Response: Abortion-related litigation is routinely pressed in federal court, and such litigation can implicate questions about whether an unborn child is a human being. Accordingly, I believe that I should not provide any views that I may or may not have as to the referenced question. As to why, please see my response to question 33.

39. Other than at your hearing before the Senate Judiciary Committee, have you ever testified under oath? Under what circumstances? If this testimony is available online or as a record, please include the reference below or as an attachment.

Response: No.

40. In the course of considering your candidacy for this position, has anyone at the White House or Department of Justice asked for you to provide your views on:

a. *Roe v. Wade,* 410 U.S. 113 (1973)?

b. The Supreme Court's substantive due process precedents?

c. Systemic racism?

d. Critical race theory?

Response: No, to each of the above.

41. Do you currently hold any shares in the following companies:

a. Apple?

b. Amazon?

c. Google?

d. Facebook?

e. Twitter?

Response: I do not hold individual shares in any of these entities. My wife and I hold a number of diversified index funds that each own shares in a large number of companies. A description of my assets is set out in my Financial Disclosure Report and Net Worth Statement submitted to the Committee.

42. Have you ever authored or edited a brief that was filed in court without your name on the brief?

Response: I have not authored a brief that was filed in court without my name on it. Over the years, I have provided feedback on numerous briefs filed in court by my clients that my name did not appear on. Recent examples include briefs filed in federal court by the Port Authority of New York and New Jersey, in Galicki v. New Jersey, et al., 2:14-cv-00169 (JXN) (D.N.J.) and Baroni v. Port Authority of New York and New Jersey, 1:21-cv-5961 (LTS) (S.D.N.Y.).

43. If so, please identify those cases with appropriate citation.

Response: Please see my response to Question 42.

44. Have you ever confessed error to a court?

Response: Not that I recall.

45. If so, please describe the circumstances.

Response: Please see my response to Question 44.

46. Please describe your understanding of the duty of candor, if any, that nominees have to state their views on their judicial philosophy and be forthcoming when

testifying before the Senate Judiciary Committee. *See* U.S. Const. art. II, § 2, cl. 2.

Response: I understand it is my responsibility to answer all questions with honesty, candor, and to the best of my ability and recollection.

Questions from Senator Thom Tillis
for Michael Farbiarz
Nominee to be United States District Judge
for the District of New Jersey

1. **Do you believe that a judge's personal views are irrelevant when it comes to interpreting and applying the law?**

   Response. Yes.

2. **What is judicial activism? Do you consider judicial activism appropriate?**

   Response: Judicial activism is a "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." Black's Law Dictionary (11th ed. 2019). It is not appropriate.

3. **Do you believe impartiality is an aspiration or an expectation for a judge?**

   Response: It is an expectation. The judicial oath requires proceeding "impartially," 28 U.S.C. § 453, and disqualification is required when the judge's "impartiality might reasonably be questioned," 28 U.S.C. § 455. See generally, e.g., Tumey v. Ohio, 273 U.S. 510, 535 (1927) (describing the "right to have an impartial judge").

4. **Should a judge second-guess policy decisions by Congress or state legislative bodies to reach a desired outcome?**

   Response: No. "It is Congress's job to enact policy," and it is a judge's "job to follow the policy Congress has prescribed." SAS Institute, Inc. v. Iancu, 138 S. Ct. 1348, 1358 (2018).

5. **Does faithfully interpreting the law sometimes result in an undesirable outcome? How, as a judge, do you reconcile that?**

   Response: In each case, a judge should pursue the same outcome: a decision based solely on the facts before the Court; the law; and the parties' arguments. This is a desirable outcome.

6. **Should a judge interject his or her own politics or policy preferences when interpreting and applying the law?**

   Response: No. "It is Congress's job to enact policy," and it is a judge's "job to follow the policy Congress has prescribed." SAS Institute, Inc. v. Iancu, 138 S. Ct. 1348, 1358 (2018).

7. **What will you do if you are confirmed to ensure that Americans feel confident that their Second Amendment rights are protected?**

   Response: If confirmed, the first meaningful step I would take is the judicial oath. The oath requires judges to "faithfully . . . discharge and perform all the duties incumbent upon"

them, 28 U.S.C. § 453, and one "duty of the judicial department" is "to say what the law is[,]" Marbury v. Madison, 5 U.S. 137 (1803). The law as it "is" protects Second Amendment rights, see, e.g., New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022), and I would faithfully follow the law, as to the Second Amendment and across the board.

8. **How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits?**

Response: When the Second Amendment's plain text covers an individual's conduct, that conduct is "presumptively constitutional." New York Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2126 (2022). To justify a regulation on such conduct, the government must show "that the regulation is consistent with this Nation's historical tradition of firearm regulation." Id. (citations omitted). In the hypothetical Sheriff's lawsuit, and in each case, I would proceed in the same way: by focusing on the facts before the Court; the applicable law, including the Second Amendment jurisprudence set out above; and the parties' arguments.

9. **What process do you follow when considering qualified immunity cases, and under the law, when must the court grant qualified immunity to law enforcement personnel and departments?**

Response: Qualified immunity is an immunity from damages. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). It is also an "immunity" from having "to stand trial or face the other burdens of litigation[.]" Behrens v. Pelletier, 516 U.S. 299, 305 (1996) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)). Accordingly, "[u]nless the plaintiff's allegations [in the complaint] state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." Forsyth, 472 U.S. at 526. This means that qualified immunity can be (and often is) raised as part of a motion to dismiss under Rule 12(b)(6) of the Federal Rule of Civil Procedure. If the Rule 12(b)(6) motion is denied, an interlocutory appeal can be taken, see Behrens, 516 U.S. at 307, or the parties can proceed with the case, including to summary judgment. At that point, qualified immunity can again be raised, this time as part of a summary judgment motion under Rule 56 of the Federal Rule of Civil Procedure. If the motion is denied, an interlocutory appeal can again be taken. See id.

As to the governing substantive standards, the Supreme Court has held "officers are entitled to qualified immunity . . . unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time." District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018) (internal quotation marks omitted). "A right is clearly established when it is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 7 (2021) (per curiam) (quoting Mullenix v. Luna, 577 U.S. 7, 11 (2015) (per curiam)). There does not need to be "a case directly on point for a right to be clearly established," but "existing precedent must have placed the statutory or constitutional

question beyond debate." Id. at 7–8 (quoting White v. Pauly, 137 S. Ct. 548, 551 (2017) (per curiam)).

10. Do you believe that qualified immunity jurisprudence provides sufficient protection for law enforcement officers who must make split-second decisions when protecting public safety?

Response: If confirmed, I would be expected to, and would, faithfully follow the qualified immunity jurisprudence of the Supreme Court and the Third Circuit. Any personal views that I may have on the subject would not be relevant.

11. What do you believe should be the proper scope of qualified immunity protections for law enforcement?

Response: Please see my response to Question 10.

12. Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?

Response: The District of New Jersey, to which I have been nominated, has for years handled a particularly large docket of patent cases, including with respect to pharmaceutical patents. Especially against that backdrop, I believe that I should not provide any views that I may or may not have as to this question. Among other things, doing so could be (erroneously) understood to suggest how I might think about future litigants and their cases. Litigants are entitled to an open-minded and case-by-case judge, who studies their arguments fairly in light of the particular facts of their case and then-current law, and does not reach any conclusions before doing so.

13. Do you believe the current patent eligibility jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?

Response: Please see my response to Question 12.

14. Copyright law is a complex area of law that is grounded in our constitution, protects creatives and commercial industries, and is shaped by our cultural values. It has become increasingly important as it informs the lawfulness of a use of digital content and technologies.

a. What experience do you have with copyright law?

Response: For the last six years, I have been the General Counsel of a large public agency. In that capacity, I have supervised various matters related to intellectual property, including both (a) highly complex federal court trademark litigation and (b) a range of licensing matters related to both trademark and patent issues. I have not done copyright work.

b. Please describe any particular experiences you have had involving the Digital Millennium Copyright Act.

Response: Please see my response to Question 14(a).

c. What experience do you have addressing intermediary liability for online service providers that host unlawful content posted by users?

Response: I do not have experience with intermediary liability for online service providers that host unlawful content posted by users.

d. What experience do you have with First Amendment and free speech issues? Do you have experience addressing free speech and intellectual property issues, including copyright?

Response: For the last six years, I have been the General Counsel of a large public agency. In that capacity, I have supervised numerous matters related to First Amendment free speech issues. Some of these have been litigated federal court matters. Others have been regulatory matters, related to promulgating and applying the rules that govern (a) government employees' speech, and (b) the public's exercise of free speech rights at regional airports and other major transportation facilities. As to intellectual property experience, please see my response to Question 14(a).

15. The legislative history of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to address infringement even when they do not receive a takedown notice. However, the Copyright Office reported that courts have conflated statutory obligations and created a "high bar" for "red flag knowledge, effectively removing it from the statute..." It also reported that courts have made the traditional common law standard for "willful blindness" harder to meet in copyright cases.

a. In your opinion, where there is debate among courts about the meaning of legislative text, what role does or should Congressional intent, as demonstrated in the legislative history, have when deciding how to apply the law to the facts in a particular case?

Response: In any case concerning statutory interpretation, I would first determine whether there is any binding Supreme Court or Court of Appeals precedent that resolves the issue presented. If not, I would look to "the statutory text, not the legislative history or any other extrinsic material," Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005), and would focus on interpreting the "statute in accord with the ordinary public meaning of its terms at the time of its enactment." Bostock v. Clayton County, Georgia, 140 S. Ct. 1731, 1739 (2020); see also, e.g., Gross v. FBL Financial Services, Inc., 557 U.S. 167, 175 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."). If the statutory text is ambiguous under binding precedent, see, e.g., In re Price, 370 F.3d 362, 369 (3d Cir. 2004) ("a provision is ambiguous when, despite a studied examination of the statutory context, the natural reading of a provision remains elusive"), I would look to other interpretive tools, to the extent doing so is authorized by Supreme Court and Court of Appeals precedent. These tools might include application of certain canons of construction. If ambiguity persists, I would consider the statute's legislative history, with a focus on those parts of the legislative history identified by the Supreme Court as more reliable. Compare, e.g., Garcia v. United States, 469 U.S. 70, 76 (1984) (describing more reliable sources) with NLRB v. SW Gen., Inc., 137 S. Ct. 929, 943 (2017) (warning that "floor statements by individual legislators rank among the least illuminating forms of legislative history").

b. Likewise, what role does or should the advice and analysis of the expert federal agency with jurisdiction over an issue (in this case, the U.S. Copyright Office) have when deciding how to apply the law to the facts in a particular case?

Response: "If a court, employing traditional tools of statutory construction," determines that a law's meaning is clear, it must apply that clear meaning "and must reject administrative constructions contrary to clear congressional intent." Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n. 9 (1984). If the court determines the law's meaning is ambiguous, formal agency interpretations based on "a permissible construction of the statute" may be entitled to deference, see id. at 843, while informal agency advice and analysis is entitled to deference only to the extent that those interpretations have the "power to persuade." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

c. Do you believe that awareness of facts and circumstances from which copyright infringement is apparent should suffice to put an online service provider on notice of such material or activities, requiring remedial action?

Response: In certain circumstances, the Digital Millennium Copyright Act provides a safe harbor for service providers. See 17 U.S.C. § 512. My role would be to

faithfully apply the statute in a given case, on the facts before the Court and based on the parties' arguments. I do not believe it is appropriate for me to express any views, now, as to whether certain facts or circumstances should suffice to put an online service provider on notice of copyright infringement.

16. The scale of online copyright infringement is breathtaking. The DMCA was developed at a time when digital content was disseminated much more slowly and there was a lot less infringing material online.

a. How can judges best interpret and apply to today's digital environment laws like the DMCA that were written before the explosion of the internet, the ascension of dominant platforms, and the proliferation of automation and algorithms?

Response: As to statutory interpretation in general, please see my response to Question 15(a). In a variety of contexts, courts consider how statutory (or constitutional) provisions should be applied in light of technological changes. See, e.g., Carpenter v. United States, 138 S. Ct. 2206 (2018); South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018); Riley v. California, 573 U.S. 373 (2014); Twentieth Century Music Corporation v. Aiken, 422 U.S. 151 (1975). Given the likelihood that, if confirmed, I would handle DMCA cases, I think it is not appropriate for me to express any general views as to how the statute should best be interpreted.

b. How can judges best interpret and apply prior judicial opinions that relied upon the then-current state of technology once that technological landscape has changed?

Response: Please see my response to Question 16(a).

17. In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about this practice.

a. Do you see "judge shopping" and "forum shopping" as a problem in litigation?

Response: Improper forum shopping has been identified as a "danger" by the Supreme Court, Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 154 (1987), and as a practice to be "discourage[d]," Hanna v. Plumer, 380 U.S. 460, 468 (1965). But the particular issues described in the question are not likely to emerge in the District of New Jersey, to which I have been nominated. In the District of New Jersey, there are three federal courthouses, and substantial numbers of District Judges are assigned to each courthouse; there is no one-Judge courthouse.

Moreover, cases are allocated to the appropriate courthouse by the Clerk of Court, pursuant to rules that require consideration of certain elemental aspects of the case, including "the residence of the defendant, . . . and the place where the cause of action arose." United States District Court for the District of New Jersey, Local Civil Rule 40.1(a).

b. If so, do you believe that district court judges have a responsibility not to encourage such conduct?

Response: Please see my response to Question 17(a).

c. Do you think it is *ever* appropriate for judges to engage in "forum selling" by proactively taking steps to attract a particular type of case or litigant?

Response: If confirmed, in each case I would focus solely on the facts before the Court; the law; and the parties' arguments. I am unaware of any body of law that permits a judge to proceed so as to attract a particular type of case or litigant.

d. If so, please explain your reasoning. If not, do you commit not to engage in such conduct?

Response: Please see my response to Question 17(c).

18. If litigation does become concentrated in one district in this way, is it appropriate to inquire whether procedures or rules adopted in that district have biased the administration of justice and encouraged forum shopping?

Response: Please see my response to Question 17(a).

19. To prevent the possibility of judge-shopping by allowing patent litigants to select a single-judge division in which their case will be heard, would you support a local rule that requires all patent cases to be assigned randomly to judges across the district, regardless of which division the judge sits in?

Response: Please see my response to Question 17(a).